No. 09-479

In the Supreme Court of the United States

KEVIN ABBOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Other than a lone sentence defending the merits of the decision below, the government's memorandum does not dispute a single word of substance set forth in the petition. The government concedes that the circuits are squarely divided on *both* questions presented in this case, namely: (1) whether the term "any other provision of law" in § 924(c)(1)(A) includes the underlying drug trafficking offense or crime of violence; and (2) whether, if not, that term includes another offense involving possession of the same firearm in the same transaction. And the government does not dispute that both questions warrant this Court's review and that they are fully presented in this case. Nevertheless, the government cursorily asks this Court to hold this case pending the Court's disposition of *United States* v. *Williams*, No. 09-466, petition for cert. pending (filed Oct. 20, 2009), which presents only the first of these questions. That request should not long detain the Court.

Critically, the government does not deny that resolution of the first question in the government's favor may leave the second unanswered. As explained in our petition (at 25), "if the government were correct that the 'except' clause is not triggered by all other mandatory minimums, it will remain to be decided whether § 924(c) can be applied to impose an additional five-year sentence where the defendant has already received a longer mandatory minimum for his use of the very same firearm and, if so, whether firearm offenses outside of § 924(c) count." Thus, these questions are related but distinct, and

both are equally important. Indeed, were the Court to answer only the question presented in *Williams*, it might only decide what is *not* covered by the except clause, leaving lower courts guessing (and in conflict) as to what *is* covered by the clause. The government disputes none of this.

Instead, the government states only that resolution of the first question is "likely" to "affect" the answer to the second. Mem. 3. Put simply, the government suggests that it is better to address the second question through dicta in *Williams* than to resolve it squarely through a holding in this case. That is exactly backwards. This Court should decide both questions on full briefing and argument presented by parties whose interests are directly at stake. As explained in the petition (at 26), the respondent in *Williams* would have no incentive to argue that, even if the except clause is not triggered by *every other* offense imposing a longer mandatory minimum, it is triggered where, as here, a longer mandatory sentence is imposed for the *very same firearm-related conduct* giving rise to the § 924(c) charge. Yet again, the government disputes none of this.

It is not hard to discern the reason behind the government's preference to have *Williams* considered in isolation: The second question presented here is even more difficult for the government than the first. Here, even if the government were to succeed in arguing that "any other provision of law" does not mean what it says (such that any longer mandatory minimum triggers the except clause), the government

must then explain why the except clause would not at least bar the imposition of multiple consecutive mandatory minimum sentences for the same firearm-related conduct. The government is not eager to take up that burden because it is difficult then to say what the statutory language *does* mean. The government could well find itself defending such bizarre conclusions as that reached by the court of appeals below—*i.e.*, that Congress enacted the words "any other offense" to apply only to "additional § 924 sentences that may be codified elsewhere in the future." Pet. App. 12a. That is more an exercise in statutory imagination than statutory construction, and the government is understandably eager to postpone it. But that, of course, is no reason to deny certiorari on an issue so plainly warranting this Court's review.

In the end, the government does not seriously dispute that this case should be granted. If the Court's preference is to grant a firearm-related case such as this one along with a non-firearm-related case, the best course remains to grant this case and *London* v. *United States*, No. 09-5844, petition for cert. pending (filed Aug. 11, 2009). As explained in the petition (at 27-29), the undersigned counsel of record represents both petitioners and will be well-positioned to present consolidated briefing and argument on both questions. (Once more, the government disputes none of this.) At the very least, the Court should grant and consolidate this case with *Williams* to ensure that both of these important questions—and the separate conflicts each has generated—are resolved directly and with the benefit of full adversarial testing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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